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IN THE

Supreme Court of the United States

October Term, 1962

No. 304

ELLIOTT KAHANER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner,
66 Court Street,
Brooklyn 1, New York

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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Petitioner, Elliott Kahaner, respectfully invoking the provision of Rule 58(2) of this Court which refers to petitions for rehearing filed on grounds of "intervening circumstances of substantial or controlling effect", prays for a rehearing by this Court to reconsider its order of October 14, 1963 which denied the petition for a writ of certiorari in this case.

The intervening circumstance above referred to is this Court's order of October 21, 1963, granting a writ of certiorari in *Evola* v. *United States*, and companion cases (Nos. 194, 195, 196, 197, 79 Misc., 80 Misc., 115 Misc., 149 Misc., 224 Misc.).

In the aforementioned *Evola* and companion cases—familiarly known as the "Genovese" case and hereinafter referred to as such—this Court's aforesaid order of Octo-

ber 21, 1963, in addition to granting the writs of certiorari, vacated the judgment of the Court of Appeals for the Second Circuit and remanded the cases to that Court "for reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487, and for such further consideration as may be appropriate". From this broad wording of the Court's order in *Genovese*, and from the remark of the Justices who concurred in part and dissented in part—to the effect that "all the evidence before the District Court was documentary and the Court of Appeals was therefore correct in making factual determinations on the basis of such evidence"—we take it that the grounds for the granting of certiorari in *Genovese* may have included both the possible error of District Judge Murphy (error which was not reached for review by the Court of Appeals) in determining that non-production of the Shaw interview notes was non-prejudicial in point of the contents of those notes, and the possible error of the Court of Appeals in resolving the issues of the appeal in regard to the Shaw materials by arriving at a *de novo* finding of its own that the Shaw materials were actually not producible at all under the Jencks Act.

As we read *Campbell II* (373 U.S. 487), this Court there showed its continuing readiness both to review lower court determinations of the prejudiciality or non-prejudiciality of producible Jencks Act materials, and to uphold the primacy of the District Court's (*vis a vis* the Court of Appeals') authority to determine questions of prejudiciality and producibility under the Jencks Act.

Question no. 4 in petitioner Kahaner's petition for certiorari in this Court was: "Is the judgment of conviction fatally defective by reason of the denial to the defendant-

petitioner of Jencks Act statements to which he was entitled?"

Petitioner Kahaner's Statement of the Case in his petition for certiorari herein stated as follows concerning the Jencks Act issue (pp. 19-20):

> "Rose Kippe, Kahaner's secretary, testified for the Government in its direct case concerning Kahaner's telephone message book, Government Exhibit 80, and her and Kahaner's practice with respect to the book (243a-246a). Kippe then testified for the defense, and during her cross-examination by the Government she was questioned concerning a prior interview by the FBI (312a) (Government's Exhibit 91 marked for identification). Kippe's statement to the FBI was not given to the defense on either occasion of her testimony, although a demand was made by the defense for her prior statements (312a-313a). Furthermore, the trial court apparently even failed to examine Kippe's statements before ruling (Tr. 2869-2872; 313a). At the outset of the trial it was agreed among all counsel that all '3500' material would be given to the defendants without the need for a formal request. Such practice was followed throughout the trial.
>
> The defense also was not supplied by the Government with a statement of Dr. Fred Miller, an FBI document expert who testified on rebuttal as to certain obliterations in Kahaner's diary (241a-243a). The Government advised the Court of Appeals that it had a report by Dr. Miller made to the FBI (Appendix hereto, *infra*, p. 26a).
>
> The Court below held that nonproduction of these Jencks Act statements was 'harmless error' because the Kippe statement, which the Court said it had examined, 'is in full accord with the very limited testimony given by Mrs. Kippe as a witness for the Govern-

> ment, which was not disputed by anyone'; and because the Miller statement, which the Court below likewise, said it read, was 'simply a summary of the findings to which Mr. Miller testified' (*ibid*)."

Among the "Reasons For Granting The Writ" in Kahaner's petition for certiorari herein was the following (pp. 37-38):

> "4. Certiorari is appropriate in this case on the ground, without more, of the denial to petitioner Kahaner of the Jencks Act statements referred to at pp. 19-20, *supra*. At this comparatively late date in the administration of the Jencks Act it is hardly necessary to cite authority for the proposition that the defendant's right to statements under 18 U.S.C. § 3500 does not depend upon whether a trial Judge believes such statements can be utilized effectively by the defendant. *Clancy* v. *United States*, 365 U. S. 312; *United States* v. *Prince*, 264 F. 2d 850 (C.A. 3 1959); *Bergman* v. *United States*, 253 F. 2d 933, 935 (C.A. 6 1958). Circuit Judge Charles E. Clark, concurring in *United States* v. *Cardillo*, 316 F. 2d pp. 606, 616–617 (C.A. 2 1963), spoke words which have a remarkable aptness for the instant situation and which contain a remarkable summons for this Court to intercede in a certain class of Jencks Act cases of which the instant case, we submit, is an example."

The order, of October 21, 1963 in *Genovese* prompts us to present in a more complete way our own Jencks Act issue for the Court's consideration. The procedural setting of the Jencks Act rulings in our case is most unusual, and is deserving, we believe, of the Court's attention:

The Kippe statement was not even examined by the Trial Court before it ruled that the Government need not furnish that statement to the defense. In itself, this action (or, non-

action) by the Trial Court seems absolutely irreconcilable with the central purpose and philosophy of the Jencks Act as this Court has consistently administered that statute, for what is happening when a Trial Court refuses to order the Government to show the defense a "3500" statement without that Court itself even examining the statement is that the Court is thereby abdicating to the prosecution the duty and power of administering the Jencks Act at the trial level.

As regards the "3500" statement of the FBI documents expert, Miller, the procedural situation is even more striking than in the case of the Kippe statement. Despite the above noted understanding among trial counsel that "3500" materials would be supplied to the defense without specific request therefor, the Government never disclosed the existence of, and it never produced, the Miller "3500" statement until the case was in the Court of Appeals—where, as above noted, the Miller statement was still not shown to the defense (nor has it been to this moment) but was produced only for examination by the Court of Appeals, which examined it and held its non-production to have been "harmless error" (*supra*).

Before we speak of the question of the potential importance of these two Jencks Act statements in the present case from the standpoint of their possible substantive impact upon the trial, let us note in a little more detail the features of procedural short-shrift which are present here:

As to one "3500" statement (Kippe) the Government refused to produce it and the Trial Court acquiesced in this refusal without even examining the statement; then the Court of Appeals examined the statement, for the first time, and ruled *ex parte* that the statement would not have helped

the defense or, seemingly, that even if it would have helped the defense its non-production was "harmless error".

As to the second "3500" statement (Miller), the Government said nothing about its existence during the trial (despite the agreement to produce all "3500" materials without specific request), and the Government also said nothing about its existence after the trial and even during the appeal *until after the defense in its Reply Brief in the Court of Appeals further pressed the issue.* In Kahaner's opening brief in the Court of Appeals (pp. 42-43) he had argued that Miller was an agent of the FBI, "that the Government had in its possession a prior statement of each witness who testified", that accordingly "it may be inferred that the Government had taken prior statements or reports from * * * agent Miller", and that "the Government should state now whether such is the fact and if so the failure to furnish such statements to defendants was error requiring reversal of this conviction". The Government's brief in the Court of Appeals (p. 102), replying to this, stated—in what was ultimately to prove to have been loose language—that "There were no statements or reports of interview of [FBI Agent Miller] in the possession of the Government, consequently none was produced for the use of the defendants". Then, in Kahaner's Reply Brief in the Court of Appeals, he pressed the question as follows (p. 7):

> "In response to our request to know whether Dr. Miller rendered a report of his findings, the Government answers that it has none in its possession. Unanswered is whether such a report or notes of his conclusions was made by Dr. Miller, who is an employee of the Federal Bureau of Investigation, as distinguished from the Government's continued possession of such report or notes."

It was only after Kahaner had thus continued to press the question that the Government finally advised the Court of Appeals that there was indeed a statement by FBI Agent Miller (which the Court of Appeals, as noted, took it upon itself to examine *ex parte*, concluding that its prior non-production had been "harmless error" (Pet. Cert. 26a-27a)).

In *Campbell II* this Court emphasized that the Trial Court is best qualified to perform the initial screening functions with regard to Jencks Act materials. It is true that the Court in *Campbell II* was speaking primarily of the question of producibility rather than of prejudiciality in the portion of its opinion in that case where it was emphasizing the special hierarchical role of the Trial Judge in administering the Jencks Act. But this Court also, it seems, favors a like function of decisional primacy at the trial court level in regard to the vexing problem of Jencks Act "harmless error". In deciding *Campbell II* itself, as well as (apparently) in granting certiorari in *Gendicese*, this Court showed its continuing concern about cases where the Jencks Act is seemingly being circumvented by rulings of "harmless error" to dispose of defendants' claims of prejudice in the withholding of producible "3500" materials. Also, again, there is in our case the added aggrieving circumstance that the Trial Court never even performed its *in camera* function at all, because it did not look at the Kippe statement and it was deprived by the Government of any opportunity to look at the Miller statement.

Indeed, if our case presented nothing in regard to the Jencks Act issues, except the facts of the Government's own conduct in withholding from the defense these "3500"

items which it had promised to produce—especially questionable being the Government's tactics in regard to the statement of its own investigative employee FBI Agent Miller—the case would be deserving of this Court's corrective intercession.

The subject matter of this case is of unusual public importance, indeed of historic importance (see our petition for certiorari at pp. 28-31, and the Government's Brief in Opposition at p. 21). The desirability of certiorari is enhanced because of the indicatedly serious likelihood that the trial of this important case was unjustly affected by the cavalier and lip-service ways in which the commands of the Jencks Act have been "administered" in this record. This brings us to the question of just how substantially the fairness of the trial may have been affected by the failure to produce the "3500" statements of Kippe and of FBI Agent Miller:

In speaking to this facet of the Jencks Act issues herein we are handicapped, of course, by the inconvenience (to put it mildly) arising from the Government's (and both lower Courts') not having vouchsafed to us the right of knowing what those statements contain. Nevertheless, it is open to us to point out where the Kippe and Miller testimony fits in the perspective of the trial record as a whole, and how the Kahaner defense *may* have been affected by the withholding of these "3500" materials. It will be recalled that the conviction of Kahaner depended indispensably upon accomplice testimony (see our Reply Brief in the instant certiorari proceeding, pp. 1-7). The Government's Brief In Opposition urged that "there are many points of corroboration" (p. 20), citing, *inter alia*, the "telephone logs" and "the testimony of secretaries". In

our aforementioned Reply Brief we discussed these two latter "points of corroboration" in considerable detail (pp. 4-5); the Court will see from reading this last cited portion of our Reply Brief that these matters concern, *inter alia*, the testimony of Kippe (one of the secretaries) and Kahaner's telephone message book and diary. This last (the diary—Ex. "T"), in turn leads directly into the subject matter of the trial testimony of FBI Agent Miller who testified to certain "doodled" obliterations in Kahaner's diary in regard to messages received from Erdman and Keogh during times pertinent to the factual issues of the trial (Govt's Appendix 234-241). It was the defense position that all such "doodled" obliterations were perfectly innocent and were without significance. Not knowing what was in FBI Agent Miller's "3500" statement, we are unable even to guess how we might have utilized that statement for effective cross-examination on this aspect of the Government's "corroboration" proofs to which the Solicitor General has himself attached so much importance in his Brief In Opposition. Likewise in regard to the Kippe "3500" statement, we are unable to guess how we might have benefited from this on cross examination, but, again, the portion of Kippe's testimony to which the "3500" statement pertains is evidently regarded by the Solicitor General as one of the Government's important "points of corroboration".

We respectfully and especially invite the Court's renewed attention to our Reply Brief in the instant certiorari proceedings. We are mentioning this because our ground for this petition for rehearing—improper denial of Jencks Act statements as a ground given new emphasis by the *Gonzales* certiorari—coalesces with the argument in our aforesaid Reply Brief which dealt with the overall question of the

alleged corroboration of the accomplice testimony in this trial.

In conclusion, we respectfully call the Court's attention to the language of the Court of Appeals of the State of New York (opinion by Fuld, J.) in the well-known case in which that Court enunciated the equivalent of the Jencks rule for New York State criminal proceedings (*People* v. *Rosario*, 9 N.Y. 2d 286, 290, 213 N.Y.S. 2d 448, 451):

> "Furthermore, omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes. Until his attorney has an opportunity to see the statement, it is asked, how can he effectively answer the trial judge's assertion that it contains nothing at variance with the testimony given or, at least, useful to him in his attempt to discredit such witness?
>
> "It is true that defense counsel will undoubtedly be in a position to cross examine at greater length than without such pretrial statements. But there is nothing wrong in this. . . ."*

* It is true that the Court went on, in the *Rosario* case, *supra*, to hold that non-production of the materials which were held producible had not prejudiced the defendant because "On the record before us, there can be no possible question of the appellant's guilt, even apart from the testimony of the witnesses whose statements had been requested and refused. Not only was there evidence of admission to friends before and after the fatal robbery, not only was there proof of a confession to the district attorney, not only was there evidence of flight, but there was ballistics testimony indicating that the lethal bullet had issued from the appellant's gun. And, of the utmost significance, examination of the prior statements discloses that the few variances contained in them were of a most inconsequential character." The question of petitioner Kahaner's guilt depended dispositively on the testimony of accomplice witnesses of the basest credibility.

CONCLUSION

It is respectfully submitted that this petition for rehearing should be granted, and that the petition for certiorari should be granted.

Respectfully submitted,

WILLIAM W. KLEINMAN and
EUGENE GOLD
Attorneys for Petitioner
Elliott Kahaner

[Certificate of counsel follows]

Certificate of Counsel

I hereby respectfully certify that the foregoing petition for rehearing on behalf of petitioner Elliott Kahaner is presented in good faith and not for delay. In this connection I may state that, as of the time of the filing of this petition for rehearing, it is not contemplated that any application will be made for a stay of the surrender of petitioner Elliott Kahaner to commence the service of his sentence, said surrender being presently scheduled for November 7, 1963. I further certify that the within petition for rehearing is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

EUGENE GOLD
Attorney for Petitioner
Elliott Kahaner